

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

RECEIVED**MAR 27 1997**

In the Matter of)
)
Streamlining the Commission's)
Rules and Regulations for Satellite)
Application and Licensing Procedures)
)

Federal Communications Commission
Office of Secretary

IB Docket No. 95-117

COMMENTS OF THE STATE OF HAWAII

The State of Hawaii, by its attorneys, respectfully requests that the Commission accept and consider the following comments on the Petition for Reconsideration filed by TelQuest Ventures, Inc. ("TelQuest") in the above-captioned matter.¹

I. BACKGROUND AND SUMMARY

Throughout the past two years, the State has expended its scarce resources participating in Commission proceedings which concern the development of competition among multichannel video programming distributors. In those proceedings, the State has urged the Commission to, at long last, take steps to ensure that providers of Direct Broadcast Satellite ("DBS") service include Hawaii in their plans so that, in furtherance of Section 1 of the Communications Act, Hawaiians are not foreclosed from receiving the benefits of this new use of technology. In December 1995, the Commission concluded that extending DBS service to Hawaii (and Alaska) both is an important national objective and is now technically feasible. To implement this development in policy, the Commission amended its rules to

¹ These comments are filed by the State through its Department of Commerce and Consumer Affairs. A division of the Department -- the Cable Television Division -- is the State's cable franchise administrator.

induce the DBS industry to serve Hawaii. However, TelQuest appears to be attempting to avoid serving Hawaii.

On March 13, 1996, TelQuest Ventures, L.L.C.² filed applications with the Commission for authorization to operate a transmit earth station to communicate with Direct Broadcast Satellite ("DBS") satellites to be located at the 91° W.L. orbital position assigned to Canada and for a blanket authorization to cover all of the small receive-only earth stations to be used by U.S. consumers to receive TelQuest's programming. On June 27 and September 9, 1996, the State filed comments with the Commission calling the Commission's attention to the fact that TelQuest appeared ready to omit Hawaii from its coverage plans and had made statements suggesting that its proposed system will not effectively serve Hawaii.³ The State emphasized that no information had been provided to it, either in filings with the Commission or otherwise, that demonstrated that the citizens of Hawaii will receive DBS service from TelQuest even roughly comparable to that available on the mainland. Moreover, the State argued that if its concerns are to be addressed, such information must be provided in detail and it must be made part of the Commission's record.

The State asked the Commission to make clear that its DBS policies control, and urged the Commission, before it processed the applications, to require TelQuest (1) to firmly commit itself to serving Hawaii or to demonstrate why serving Hawaii is technically

² On December 31., 1996, TelQuest Ventures, L.L.C. assigned to TelQuest Ventures, Inc. all of its right, title and interest in, to and under the earth station applications.

³ See Comments and Request for Leave to File of the State of Hawaii, File Nos. 758 & 759-DSE-P/L-96 (filed June 27, 1996); Supplemental Statement of the State of Hawaii, FCC File Nos. 758 & 759-DSE-P/L-96 (filed Sept. 9, 1996).

infeasible; and (2) if it alleges that service to Hawaii is technically infeasible, to demonstrate how its proposed system will not adversely affect the development of a healthy DBS market in Hawaii.

In November 1996, the FCC's International Bureau dismissed TelQuest's DBS earth station applications on the basis of a new Commission rule that bars the filing of such applications when the applicant has not satisfied all the conditions of its satellite licenses.⁴ TelQuest's application for review of that dismissal remains pending before the Commission.⁵

Subsequently, on December 16, 1996, the Commission released its Report and Order, FCC 96-425, ("Report and Order") in the above-captioned proceeding.⁶ On March 12, 1997, TelQuest petitioned the Commission to reconsider and vacate the "prior satellite licensing requirement adopted in the Report and Order and to reinstate and grant its earth station applications."⁷ TelQuest also separately filed a motion to stay the Report and Order.⁸

In filing these comments, the State does not opine on the merits of TelQuest's arguments concerning the appropriateness and validity of the prior satellite licensing requirement or the Report and Order. Rather, the State wishes to re-emphasize to the

⁴ In re the Application of TelQuest Ventures, L.L.C., Report and Order, 11 FCC Rcd. 8151, recon. denied, 11 FCC Rcd. 13943 (1996), application for review filed (November 29, 1996).

⁵ TelQuest Application for Review, File Nos. 758-DSE-P/L-96 and 759-DSE-P/L-96 (filed Nov. 29, 1996).

⁶ 62 Fed. Reg. 5924 (Feb. 10, 1997).

⁷ Petition for Reconsideration of TelQuest Ventures, Inc., IB Docket No. 95-117 (filed March 12, 1997).

⁸ Motion for Stay of TelQuest Ventures, Inc. IB Docket No. 95-117 (filed March 12, 1997).

Commission that no license should be granted to TelQuest unless and until TelQuest satisfies its obligations under the Commission's DBS coverage requirements. TelQuest has shown nothing to date that would indicate it can meet this public interest requirement.

II. COMMENTS

A. **TelQuest Should Commit to Extend Its Service to Hawaii or Demonstrate Why Such Service is Technically Infeasible**

In its Revision of Rules and Policies for the Direct Broadcast Satellite Service, the Commission found that the DBS industry is increasingly mature; that it is uncertain whether DBS service will be provided outside the contiguous United States in the near term; and that it is now important to take steps to ensure that consumers in non-contiguous points enjoy the full benefits of DBS.⁹ To this end, the Commission amended its DBS rules to now require that all new DBS licensees either provide service to Hawaii and Alaska or demonstrate why such service is not technically feasible. Although the Commission declined to require existing licensees to reconfigure their systems to accommodate Hawaii, all licensees (existing and new) must relinquish their "western" orbital slots and channels (at 148° W.L., 157° W.L., 166° W.L., or 175° W.L.) if they are not serving Hawaii and Alaska by the end of their initial license terms.¹⁰

TelQuest should be held to no lesser standard. With regard to the Commission's coverage policy, TelQuest is no different from any applicant seeking FCC

⁹ Revision of Rules and Policies for the Direct Broadcast Satellite Service, Report and Order, IB Docket No. 95-168, PP Docket No. 93-253, at ¶¶ 125-28 (released Dec. 15, 1995).

¹⁰ See id. at Appendix B (establishing 47 C.F.R. § 100.53).

authority to operate an integrated DBS system. If TelQuest wants to uplink DBS programming to Canadian satellites for consumption in the United States, it should abide by the Commission's rules designed to promote truly nationwide availability of DBS service. Any other result would be inequitable to the citizens of Hawaii and would undermine the Commission's Section 1 mandate.

In recognition of the State's concerns and its own mandate, the Commission has said that "[a]ny party acquiring channels at [the 101° W.L. or 61.5° W.L.] locations that desires not to provide service to Alaska or Hawaii will bear the burden of showing that such service is not feasible as a technical matter. . . ." ¹¹ This policy enhances the likelihood that a healthy DBS market will develop in Hawaii in two related ways. It encourages new applicants to plan to serve Hawaii or face the possibility that their applications could be denied, and it gives the Commission and the public the opportunity to scrutinize any effort to omit Hawaii from coverage and possibly persuade the applicant not to do so. TelQuest should not be exempted from this process merely because it has arranged to utilize channels at orbital slots between 101° W.L. and 61.5° W.L.

B. If TelQuest Alleges that Service to Hawaii is Technically Infeasible, It Also Should Demonstrate That the Hawaii DBS Market Will Not Be Adversely Affected

If TelQuest ultimately alleges that providing service to Hawaii is technically infeasible, those allegations not only should be carefully scrutinized, but TelQuest also should be required to demonstrate that the Hawaii DBS market will not be adversely affected by grant of the application. If the application were granted, the State submits that there is a

¹¹ Id. at ¶ 128.

very real chance that the health of the envisioned DBS market in Hawaii would be diminished -- to the detriment of Hawaii's consumers and the Commission's pro-competitive policies.

In brief, it is at best unclear whether the U.S. market will support more than a limited number of DBS providers. Current systems utilize eastern orbital slots. At a minimum, the addition of an entity not serving Hawaii would further reduce the chances that DBS service (with all of its anticipated capabilities) would grow healthily in Hawaii as it is now doing on the Mainland, and it will greatly limit competition in the Hawaiian market.

If TelQuest alleges that it cannot serve Hawaii, it should be required to document the effects of bypassing the Hawaiian market on the development of DBS service in that market. The Commission already has allocated sufficient capacity to serve the U.S. Mainland and Hawaii. Tempo has previously indicated that Hawaii can be served from orbital slots at least as far east as 110° W.L. The issues TelQuest should address are, if it does not intend to serve Hawaii, how would the remaining DBS orbital capacity be devalued, and what is the likelihood that the capacity would remain fallow or be used less intensively as a result of TelQuest's activities? In sum, the Commission should view with suspicion, and scrutinize, any new excuse that suggests either directly or indirectly that Hawaii should not receive DBS service.

C. The Commission Should Request TelQuest To Submit, For Inclusion In The Public Record, Meaningful Information Regarding Its Ability To Serve Hawaii

Given TelQuest's apprehension about addressing in any detail the difficulties it will face in serving Hawaii, and to avoid any future misunderstanding as to whether the

State's concerns in this area have been addressed, the State again, as it did in its September 9, 1996 Statement to the Commission, asks that TelQuest be instructed by the Commission to take a few, minimally burdensome steps:

- TelQuest should be required to provide the State and the Commission detailed information regarding its abilities to provide direct-to-home DBS service, and only DBS service, to Hawaii. This showing should at least include: coverage maps that depict areas where subscribers will be able to receive DBS service, as well as areas shielded by terrain and other factors; estimations of the percentage of population and territory unable to receive DBS service because of shielding; a description of the methods used to derive that data; and a timetable of when service would be available and marketed in those areas not subject to shielding.
- Also for those areas not subject to shielding, TelQuest should be required to describe how service to Hawaii might differ from that available on the mainland. For example, what size DBS antennas would be necessary, how much more would DBS antennas and service cost in Hawaii than on the mainland, and would signal quality in Hawaii be atypically degraded even with different size antennas? TelQuest also could provide any other factors it believes to be important.
- If TelQuest is unable to serve Hawaii, it should be required to show how a grant of its application will not adversely affect the advent, or the timing of the advent, of competitive DBS services to Hawaii.

Also, it is imperative that TelQuest's showings be made part of the public record so that, if the Commission decides to grant an application, the earth station authorization can be conditioned on compliance with the proposal.

III. CONCLUSION

For all of the foregoing reasons, the State of Hawaii urges the Commission not to process the applications of TelQuest until the State and the Commission can be assured that TelQuest will not undermine the Commission's goal of promoting a truly nationwide market for DBS service.

Respectfully submitted,

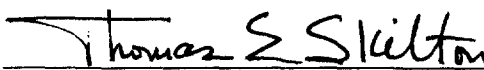
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